Supreme Court, U.S.
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No. 01-445

IN THE

Supreme Court of the United States

THE WYANDOTTE NATION, a federally recognized tribe,

Petitioner,

v.

SAC AND FOX NATION OF MISSOURI, IOWA TRIBE OF KANSAS AND NEBRASKA, PRAIRIE BAND OF POTAWATOMI INDIANS, KICKAPOO TRIBE OF INDIANS AND BILL GRAVES, GOVERNOR OF THE STATE OF KANSAS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENTS

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QUESTION PRESENTED

Whether the Tenth Circuit Court of Appeals correctly determined that a public burying-ground in Kansas City, Kansas, was not a reservation of the Wyandotte Tribe of Oklahoma, as that term is used in the Indian Gaming Regulatory Act.

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STATEMENT OF THE CASE

1. The Nature of the Proceeding.

This case is a dispute between the Wyandotte Tribe of Oklahoma ("Oklahoma Tribe") and certain "Kansas Parties".[1] The Oklahoma Tribe wants to establish a gambling casino adjacent to the historic "Huron Cemetery" in Kansas City, Kansas.

The Kansas Parties are the Governor of Kansas and the four federally-recognized Indian tribes with reservation lands in Kansas.[2] Each Tribe is the beneficial owner of and exercises jurisdiction over its tribal reservation lands in Kansas, which lands are held in trust for the respective Tribes by the United States of America. Each Tribe is party to a compact with the Governor of Kansas, which provides, in pertinent part, that the four Kansas Tribes may conduct Class III Indian gaming in the State of Kansas pursuant to applicable federal and state law.[3]

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1. Note that the Wyandotte Tribe of Oklahoma ("Oklahoma Tribe") now appears to be calling themselves the "Wyandotte Nation." However, there already is a Wyandotte Nation of Kansas, which is incorporated in that state under state law. To avoid confusion with the Wyandotte Nation of Kansas, we will continue to refer to the Oklahoma Tribe by its original name.

2. This case involves the opinion reported in *Sac and Fox Nation of Missouri, et al. v. Norton, et al.*, 240 F.3d 1250 (10th Cir. 2001). The Kickapoo Tribe in Kansas initiated separate but concurrent litigation from that initiated by the Governor and the other three tribes. Both actions were considered concurrently by the Tenth Circuit Court of Appeals, which adopted the opinion issued in *Sac and Fox* for the Kickapoo case. *Kickapoo Tribe v. Deer*, 4 Fed. Appx. 728 (10th Cir. 2001). Petitioner served the Kickapoo Tribe with the petition for writ of *certiorari* herein, and evidently considers the Kickapoo Tribe a party to this appeal.

3. Under certain circumstances, Indian tribes may conduct gaming on their reservations if they enter into compacts with the affected state. 25 U.S.C. § 2710(d). Class III Indian gaming includes such games as pull tabs, Keno and slot machines. 25 U.S.C. § 2703.

In contrast, the Oklahoma Tribe

– has no trust lands in Kansas (other than a recently acquired tract adjacent to the Huron Cemetery, which is part of this controversy and their claimed interest in the Cemetery);

– no members in Kansas;

– no presence in Kansas, and;

– no compact with the State of Kansas to conduct Class III gaming.

The Oklahoma Tribe does have a reservation in Oklahoma. Because of the dim prospects for gaming on their reservation, the Oklahoma Tribe sought various Kansas sites. They attempted to use a tenuous connection to the Huron Cemetery in Kansas to circumvent the requirements of the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701-2721 ("IGRA"), and establish a casino in another state in a location remote from their reservation.

The Huron Cemetery, located in downtown Kansas City, Kansas, is listed on the National Register of Historic Places. It is a federally-owned cemetery containing a number of Indian burials, some in marked graves but most in unmarked graves, and the remains of Union soldiers from the Topeka Battery, 2nd Regiment, Kansas State Militia, who died in the Battle of Westport in 1864. Although some remains (including the remains of Black Union soldiers) were later reinterred in Topeka, some still remain buried in the Cemetery. The Huron Cemetery is located more than 200 miles from the Oklahoma Tribe's reservation in Oklahoma.

This lawsuit began when the Secretary of the Interior ("Secretary") decided to acquire in trust a small tract of land adjacent to the Cemetery for the benefit of the out-of-state Oklahoma Tribe, which wanted to use the land to penetrate

the lucrative Kansas City gambling market. This property contains a defunct "Shrine Temple" and is referred to as the "Shriner Tract." It encompasses approximately one-half acre.

The status of the Cemetery is critical to the status of the Shriner Tract. Only if the Huron Cemetery was a "reservation" of the Oklahoma Tribe on October 17, 1988, can the adjacent Shriner Tract be placed in trust *for gaming purposes* by the Tribe without complying with the state consent requirements of 25 U.S.C. § 2719(b)(1)(A). That statute provides that a tract of land can be taken into trust for gaming only if it is within or adjacent to an existing Indian reservation existing in 1988. If a tract of land is not so situated, then three requirements must be met: 1) consultation with state, local and nearby tribal officials; 2) a determination that a gaming facility on the newly acquired lands would be in the best interest of the tribe and its members and would not be detrimental to the surrounding community; and 3) concurrence of the governor of the affected state to the acquisition. 25 U.S.C. § 2719(b). None of these three requisites was satisfied here. To avoid compliance with these requirements, the Oklahoma Tribe heavily lobbied the Secretary to determine that the Huron Cemetery, adjacent to the Shriner Tract, was a Wyandotte "reservation."

On June 12, 1996, the Bureau of Indian Affairs ("BIA") published a "Notice of Final Agency Determination to Take Land Into Trust" in which it indicated that within "no sooner than 30 days" it would take certain property in Kansas City, Kansas, into trust for the Oklahoma Tribe for gambling. The notice gave no underlying reasoning, offered no supporting facts, and provided no justification as to why the Secretary was taking land in downtown Kansas City into trust for gaming for an Oklahoma tribe whose reservation was over 200 miles away.

Within the 30-day notice window, the Governor of Kansas and the four Kansas Tribes timely filed this lawsuit to stop the acquisition. In their Complaint, the Kansas Parties claimed unlawful exercise of trust authority and violation of IGRA. The Kansas Parties alleged that the final agency action was unwarranted by the facts, contrary to law, and arbitrary and capricious.[4]

2. Relevant History of the Wyandotte Indians and the Huron Cemetery.

To understand the tenuous and remote connection the Oklahoma Tribe has to Kansas City, it is necessary to briefly review the history of the Tribe and the Huron Cemetery. The original 700-member Wyandotte Nation moved to Kansas from Ohio and Michigan in the 1840s, pursuant to the Treaty of March 17, 1842. Treaty of March 17, 1842, 11 Stat. 581, *reprinted in* 2 Charles J. Kappler, Indian Affairs, *Laws and Treaties* 534-37 (1904). In that treaty, the Wyandotte Indians ceded to the United States their remaining lands in Ohio and Michigan in return for certain payments and a 148,000-acre reservation west of the Mississippi River.

Once the Wyandotte Indians moved to Kansas, they were without a reservation as the United States failed to provide the lands promised. To compensate for its breach of the Treaty

4. The Oklahoma Tribe could not simply buy land in Kansas City and build a casino because IGRA prohibits gaming on any land acquired after October 17, 1988, unless that land is located within or adjacent to a reservation that existed as of that date. *See* 25 U.S.C. § 2719(a)(1). Given this restriction, the Oklahoma Tribe has had to fabricate a "reservation" in downtown Kansas City on which or next to which it can build its casino. To achieve this goal, the Oklahoma Tribe hired a lobbyist who convinced the Secretary to declare the Huron Cemetery – an old Indian cemetery in downtown Kansas City – to be part of the Oklahoma Tribe's "reservation." The Cemetery sits 220 miles away from the Oklahoma Tribe's reservation in Ottawa County, Oklahoma. The Oklahoma Tribe then had the Secretary take into trust for gaming .52 acres adjoining the Cemetery.

of March 17, 1842, the United States authorized the Wyandotte Indians to enter into a contract with the Delaware Nation of Indians (then residing in Kansas) to purchase 36 sections of land (23,040 acres), and to receive in donation from the Delaware Nation three additional sections (1,923 acres). Treaty of December 14, 1843, 9 Stat. 337, *reprinted in* 2 Charles J. Kappler, Indian Affairs, *Laws and Treaties* 1048 (1904).

In 1855, the Wyandotte Nation agreed to dissolve and terminate its relations as a tribe with the United States in exchange for individual United States citizenship for its members. Treaty of January 31, 1855, art. 1, 10 Stat. 1159, *reprinted in* 2 Charles J. Kappler, Indian Affairs, *Laws and Treaties* 677-81 (1904). In addition, the Wyandotte Indians agreed to relinquish all former United States treaty obligations granted the former Wyandotte Nation. 1855 Treaty, art. 6, *reprinted in* 2 Kappler at 680. In the Treaty of 1855, the Wyandottes agreed to cede and relinquish their right, title, and interest in and to the land purchased from the Delaware, so that land could be reconveyed to individual members in fee simple. The Wyandottes also agreed that the United States could exclude from the reconveyance process a public burial ground, which is today known as the Huron Cemetery. 1855 Treaty, art. 2, *reprinted in* 2 Kappler at 678.

The entirety of Article 2 of the Treaty of 1855 is critical to understanding the congressional intent of the Treaty:

> The Wyandott Nation hereby cede and relinquish to the United States, *all their right*, title, and interest in and to the tract of country situate in the fork of the Missouri and Kansas Rivers, which was purchased by them of the Delaware Indians, by an agreement dated the fourteenth day of December, one thousand eight hundred and forty-three, and sanctioned by a joint resolution of Congress approved July twenty-fifth,

> one thousand eight hundred and forty-eight, *the object of which cession is, that the said lands shall be subdivided, assigned, and reconveyed, by patent, in fee-simple*, in the manner hereinafter provided for, to the individuals and members of the Wyandott Nation, in severalty; *except as follows, viz*: The portion now enclosed and used as a *public burying-ground, shall be permanently reserved and appropriated for that purpose*; two acres, to include the church-building of the Methodist Episcopal Church, and the present burying-ground connected therewith, are hereby reserved, granted, and conveyed to that church; and two acres, to include the church-building of the Methodist Episcopal Church South, are hereby reserved, granted, and conveyed to said church. Four acres, at and adjoining the Wyandott ferry, across and near the mouth of the Kansas River, shall also be reserved, and, together with the rights of the Wyandotts in said ferry shall be sold to the highest bidder, among the Wyandott people, and the proceeds of sale paid over to the Wyandotts. On the payment of purchase-money in full, a good and sufficient title to be secured and conveyed to the purchaser, by patent from the United States.

1855 Treaty, art. 2, *reprinted in* 2 Kappler at 678 (emphasis added).

Thus, the Treaty provided that the "portion now enclosed and used as a *public burying-ground, shall be permanently reserved and appropriated for that purpose*." (Emphasis added). *Id.* The rest of the ceded Wyandotte lands were to be "subdivided, assigned, and reconveyed by patent, in fee simple, in the manner hereinafter provided for, to the individuals and members of the Wyandott Nation, in severalty." *Id.* No language in the 1855 Treaty stated that the burial ground was to be held or treated by the United States

as an Indian reservation for the Wyandottes as a tribal group who were, through the Treaty, ceasing their tribal existence. The Treaty simply stated that the land was not to be conveyed to individual members but reserved for limited use as a "public burying-ground." *Id.* A *public* burying-ground is obviously not an Indian reservation.

The 1855 Treaty effected a split within the Wyandotte Nation. Pursuant to the Treaty, those Wyandotte Indians who wished to become citizens of the United States relinquished their tribal membership in exchange for national citizenship. However, the Wyandotte Indians who wanted to remain tribal members were allowed to apply for an exemption "from the immediate operation" of the Treaty, that would have "continued to them the assistance and protection of the United States." 1855 Treaty, art. 1, *reprinted in* 2 Kappler at 677.

This latter group, the Petitioner herein, is known today as the Wyandotte Tribe of Oklahoma. They left Kansas and, in 1857, moved to Indian Territory in Oklahoma to live among the Senecas. Ten years later, this group became party to the Treaty with the Senecas and Others, Treaty of February 23, 1867, 15 Stat. 513, *reprinted in* 2 Charles J. Kappler, Indian Affairs, *Laws and Treaties* 960-69 (1904), and were provided by treaty with the United States "their new homes" – land provided to them by the United States and ceded from the Senecas. 1867 Treaty, art. 13, *reprinted in* 2 Kappler at 963.

The other group of Wyandotte Indians, i.e., those that became United States citizens, came to be known as the "Absentee Wyandotte Indians" or, as they prefer, the Wyandottes, and their descendants. They have incorporated under Kansas law as the Wyandotte Nation of Kansas, Inc., and are seeking federal tribal recognition. The Absentee Wyandotte have lived in Kansas since the 1855 Treaty.[5]

5. The Wyandotte Nation of Kansas should not be confused with the Oklahoma petitioner herein, who now also call themselves the "Wyandotte Nation." *See* footnote 1.

Because the 1855 Treaty permanently reserved the Huron Cemetery for sole use as a "public burying-ground" and dissolved the Wyandottes as a tribe, and because the 1867 Treaty with the Senecas was silent as to the Huron Cemetery, there is no historical evidence, no Treaty, and no Act of Congress indicating that the Oklahoma Tribe has any right, title, or interest in the Huron Cemetery as a tribal "reservation." Article 2 of the 1855 Treaty provided for the Wyandottes to cede all their land to the United States for reconveyance in fee simple to individuals but that "[t]he portion now enclosed and used as a public burying-ground, shall be permanently reserved and appropriated for that purpose. . . ." 1855 Treaty, art. 2, *reprinted in* 2 Kappler at 678.

In 1908, the United States Attorney General opined that title to the Huron Cemetery was in the United States, subject to the right of Indians to use the Cemetery as a burial ground. 26 U.S. Op. Atty. Gen. 491 (1908). The Attorney General also found that the Oklahoma Wyandottes had abandoned the Huron Cemetery, having long since reorganized and removed to Indian Territory in Oklahoma. *Id.* at 495. In 1918, the United States and the City of Kansas City, Kansas, entered into a perpetual care contract for maintenance of the public Cemetery stating:

> [T]he City of Kansas City, Kansas, agrees to forever maintain, care for, preserve the lawns and trim the trees and give the grounds the same and equal attention that it gives its City parks within the main part of the city, and particularly that of Huron Park adjoining said Cemetery, and that the city of Kansas City, will furnish police protection equivalent to that furnished for the protection of Huron Park; and furnish all electrical energy free of charge for the maintenance of the electric lights, as provided for in the plans and specifications, maintaining and keeping in place all globes and

> fixtures, and give said Cemetery any and all care that a park of its nature in the heart of a city should demand.

Contract Between the United States of America and the City of Kansas City, Kansas, March 12, 1918.

In *Kansas City, Kansas, et al. v. United States et al.*, 192 F. Supp. 179, 180 (D. Kan. 1960), an action brought by the City of Kansas City to enjoin the United States from selling the Huron Cemetery, the district court concluded that the Wyandottes who moved to Oklahoma after the Treaty of 1855 "do not use [the Huron Cemetery] and since their removal to Oklahoma have not used it. They have no interest in maintaining it as a cemetery." *Id.* at 181.

3. The Oklahoma Tribe's Attempt to Establish Out-of-State Gaming.

As the Tenth Circuit Court of Appeals noted, due to ". . . dim prospects for gaming on its Oklahoma reservation. . . .", the Oklahoma Tribe began attempts to acquire land in Kansas for gaming. *Sac and Fox Nation of Missouri, et al. v. Norton, et al.*, 240 F.3d 1250, 1255 (10th Cir. 2001). After efforts failed to have land located in Park City, Kansas, taken into trust for the purpose of gaming, the Oklahoma Tribe switched its focus to land in downtown Kansas City, Kansas.[6] In the trust application documents, the Tribe argued for the first time that the public Huron Cemetery was its "reservation." The Oklahoma Tribe contended that it was entitled to the former federal courthouse in Kansas City under the excess property statute, arguing that the courthouse was contiguous to its "reservation" (*i.e.*, the Huron Cemetery). The Interior Board of Indian Appeals rejected this argument, finding that the Oklahoma Tribe did not have

6. Department solicitors had informed the Tribe that it would not be able to have the Park City land approved for gaming without complying with the consultation and concurrence requirements of 25 U.S.C. § 2719(b).

an existing reservation in Kansas. *Wyandotte Tribe of Oklahoma v. Muskogee Area Director, Bureau of Indian Affairs*, IBIA 95-79-A, 28 IBIA 247 (Oct. 25, 1995) [23 Indian Law Rep. 7081]. In so holding, the Board noted: "Only four tribes have been recognized as having reservations in Kansas, those tribes being the Iowa, Kickapoo, Potawatomi, and Sac and Fox." 28 IBIA 247, 259 n.15.

On January 29, 1996, the Oklahoma Tribe filed its application for acquisition of the "Shriner Tract" adjacent to the Huron Cemetery in downtown Kansas City to be used for gaming. The Tribe alleged that it would purchase the tract with "Pub. L. No. 98-602 funds."[7]

7. Congress enacted Pub. L. No. 98-602 to provide for the distribution of funds appropriated in satisfaction of judgments awarded to the Wyandotte Tribe of Oklahoma pursuant to Indian Claims Commission proceedings. Pub. L. No. 98-602, § 101. Among other things, the Act provided:

> A sum of $100,000 of such funds [allocated to the Wyandotte Tribe of Oklahoma under the act] shall be used for the purchase of real property which shall be held in trust by the Secretary for the benefit of such Tribe.

Pub. L. No. 98-602, § 105(b)(1), 98 Stat. 3151.

The Pub. L. No. 98-602 funds were given directly to the Tribe in 1984, and were not maintained by the Secretary for the Tribe. Pub. L. No. 98-602 § 101(b)(1). Of the $100,000 to be used for the purchase of real property, the agency admitted that at least $25,000 had already been used by the Tribe for purchase of land in Park City, Kansas. The Secretary stated that if the price of the .52 acres exceeded the Pub. L. No. 98-602 funds [then $70,000], "the Tribe would lose the benefit" of Pub. L. No. 98-602. All three decision-makers who were deposed acknowledged that it was important to the Secretary's Decision, to acquire Kansas land in trust for the Tribe, that the monies used for the purchase be Pub. L. No. 98-602 funds.

The Solicitor's February 13, 1996, opinion assumed that Pub. L. No. 98-602 monies would be used by the Tribe for the purchase of Kansas City, Kansas, property for the Tribe. That statute provided (Cont'd)

On June 12, 1996, after numerous complicated machinations, the Secretary took final agency action by publishing a Notice of Final Agency Determination ("Secretary's Decision") to purchase and take the Shriner Tract into trust for gaming purposes, triggering a 30-day period for commencement of judicial review pursuant to 25 C.F.R. § 151.12 and written agency policy. This lawsuit was commenced by the Governor of Kansas and the Kansas Parties.

ARGUMENT–REASONS FOR DENYING THE WRIT

1. The Decision of the Circuit Court is Not in Conflict with a Decision of Another United States Court of Appeals, Nor Has it Decided an Important Federal Question in a Way That Conflicts with a Decision of a State Court of Last Resort.

Petitioner does not allege that the decision below conflicts with the decision of any federal court of appeals or state court of last resort, and we know of no such conflict. Nothing could be more local than a circuit court giving specific definition to a statute involving a specific geographic location, in the unique and rather bizarre circumstances

(Cont'd)

that $100,000 of funds from a judgment fund "shall be used for the purchase of real property which shall be held in trust . . ." by the government for the Oklahoma Tribe. Pub. L. No. 98-602, 98 Stat. 1351. Although not involved in this petition for certiorari, the circuit court held that those provisions of the public law "imposed a nondiscretionary duty" on the Secretary to take land into trust. *Sac and Fox v. Norton*, 240 F.3d 1250, 1262 (10th Cir. 2001). After complete review of the record, the circuit court concluded that the Secretary's determination that the proper funds were used for purchase "was not supported by substantial evidence in the record." *Id.* at 1265. The circuit court reversed the district court's holding on that matter and remanded the matter to the Secretary for further consideration of the issue. *Id.* at 1264. The issue is still pending.

involved here. The court below was not directly interpreting a treaty or the Constitution of the United States, but rather a decision by the district court in a specific context. Although there is some statutory interpretation involved, it is a highly localized and particularized setting. There is no reason for this Court to review this case.[8]

2. The Decision Below Does Not Warrant the Supervisory Jurisdiction of this Court.

The Court has stated that it will grant a writ of *certiorari* "only for compelling reasons" such as to review a decision that has "so far departed from accepted and usual course of judicial proceeding . . . as to call for the exercise of this Court's supervisory power." Sup. Ct. R. 10. As the history of the Oklahoma Tribe demonstrates, and as will be noted below, there is no such departure here.

3. The Circuit Court's Determination that the Huron Cemetery Is Not the "Reservation" of the Oklahoma Tribe Is Correct Because the Cemetery Is Not a Reservation Within the Meaning of 25 U.S.C. § 2719(a)(1).

The undisputed history of the Huron Cemetery makes it clear that the term "reservation" under IGRA does not include a free-standing *public* burial ground such as the Huron Cemetery.

In enacting IGRA, Congress declared a general prohibition on acquisition of new lands by the Secretary for tribal gaming, stating: "Except as provided in subsection (b), gaming regulated by this Act *shall not be conducted on lands acquired by the Secretary in trust for the benefit of an Indian tribe after October 17, 1988. . . .*" 25 U.S.C. § 2719(a) (emphasis added). This prohibition was subject to a

8. Petitioner presents the circuit court's opinion as being in conflict with *Conley v. Ballinger*, 216 U.S. 84 (1910). This is discussed in detail in section 7 of the argument herein.

few specific exceptions in 25 U.S.C. § 2719(a), as follows: "[no gaming on land acquired after October 17, 1988] unless – (1) such lands are located within or contiguous to the boundaries *of the reservation of the Indian tribe on the date of enactment of this Act* [enacted October 17, 1988]." 25 U.S.C. § 2719(a)(1) (emphasis added).

If new land is acquired which is not contiguous to an existing reservation, then gaming can proceed *only* if stringent requirements are met, including the concurrence of the governor of the state where the lands are located. 25 U.S.C. § 2719(b)(1)(A).

The adjacent Shriner Tract cannot be placed in trust *for gaming purposes* by the Tribe absent compliance with 25 U.S.C. § 2719(b)(1)(A) unless the Huron Cemetery was the "reservation" of the Oklahoma Tribe on October 17, 1988. Thus, "reservation" within the meaning of IGRA has a special connotation limited to certain lands in trust status prior to 1988. As noted earlier, if the Cemetery is not a reservation, then compliance with IGRA requires: 1) consultation with state, local and nearby tribal officials; 2) a determination that a gaming facility on the newly acquired lands would be in the best interest of the tribe and its members and would not be detrimental to the surrounding community; and 3) concurrence of the governor of the affected state to the acquisition. None of these three requisites is satisfied here.

The most reliable indicator of Congress's intent in allowing trust acquisitions for land contiguous to reservations is the language of IGRA itself. Although the term "reservation" is not defined in IGRA, words of a statute should be construed in accordance with their ordinary or common meaning. "A fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary . . . meaning." *Johns v. Stewart*, 57 F.3d 1544, 1555 (10th Cir. 1995) (citing *Perrin*

v. United States, 444 U.S. 37, 42 (1979)); *Bartlett v. Martin Marietta Operations Support, Inc.*, 38 F.3d 514, 518 (10th Cir. 1994) ("The court is obliged to give terms their plain meaning whenever possible.").

Undoubtedly in 1988, Congress understood the phrase, "the reservation of the Indian tribe," in its ordinary and common meaning as "land set aside for the *residence* of tribal Indians." *Felix S. Cohen's Handbook of Federal Indian Law*, 34-35, (Renard Strickland ed., 2d ed. Michie 1982) (*1982 Handbook*) (emphasis added). According to the foremost legal scholar in Indian law, Felix Cohen, this common understanding of the term "reservation" has been the accepted meaning of the term recognized since the 1840s. *Id.*

Here the Secretary's Decision equated land "reserved" for the express and sole use as a burial ground for the *public* with land reserved as a *residence* for a specific tribe of Indians. The Secretary concluded that land "reserved" for public burying-ground purposes means "reservation" under IGRA. No justification for this position can be found in the text of IGRA or case law. Moreover, had Congress intended to allow gaming on public land contiguous to reserved land in enacting 25 U.S.C. § 2719(a)(1), Congress surely would have expressly said so. Congress's intent to restrict gaming to reservation land is thus clear on the face of the statute itself.

IGRA elsewhere distinguishes between "reservation" land and trust or reserved land. For example, IGRA allows tribal gaming on "Indian lands" as defined by 25 U.S.C. § 2703(4):

> (4) The term "Indian lands" means –
>
> (A) all lands within the limits of any Indian reservation; and
>
> (B) any lands title to which is either held in trust by the United States for the benefit of any Indian

> tribe or individual or held by any Indian tribe or individual subject to restriction by the United States against alienation and over which an Indian tribe exercises governmental power.

25 U.S.C. § 2703(4)(A). Thus, "Indian lands" under IGRA include "reservation" lands *and* certain types of lands "held in trust" by the United States for a tribe or Indian. 25 U.S.C. § 2703(u)(B). IGRA distinguishes and does not equate the two categories of lands. Under the Secretary's interpretation that "reserved" lands are the same as a "reservation," subcategories (A) and (B) of the definition of "Indian lands" in Section 2703 would be a redundancy.[9]

Congress clearly understood that not all "Indian lands" are "reservation" lands. Had Congress intended to broaden the classification of Indian lands under the Act, Congress could have used "Indian country" as the definition of "Indian lands," but it did not. Thus, even assuming *arguendo* that the Huron Cemetery is held in trust by the United States for a tribe, that would still not qualify that parcel as a "reservation" under IGRA. The Secretary's Decision to acquire the Shriner Tract as contiguous to a "reservation" was legally baseless and an abuse of discretion.

Congress's definition of the term "Indian lands" as including both "reservation" and "lands held in trust" is a key to understanding Congress's intent. "It is axiomatic that the statutory definition of the term excludes unstated meanings of the term." *Meese v. Keene*, 481 U.S. 465, 484 (1987). By including trust lands within the definition of

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9. The Secretary's interpretation thus runs afoul of the rule of statutory construction that statutes should be interpreted so that every term has meaning and is not a mere surplusage. As the Tenth Circuit stated in *Homeland Stores, Inc. v. Resolution Trust Corp.*, 17 F.3d 1269, 1273 (10th Cir. 1994), "We begin with the established principle of statutory construction that, if possible, '[a] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous.'" (citation omitted).

"Indian lands," Congress demonstrated that it was aware that trust lands are included within the term "Indian country" for jurisdictional purposes, but did not intend that it be included within the term "reservation" as a definition of "Indian lands."

IGRA makes clear that mere trust status is not sufficient to bring land within the Act's definition of "reservation" for purposes of 25 U.S.C. § 2719(a)(1). The Secretary may not take land into trust for an Indian tribe for purposes of gaming unless "such lands are located within or contiguous to the boundaries of the reservation of the Indian tribe on October 17, 1988." 25 U.S.C. § 2719(a)(1). The only pertinent exception to this prohibition, absent here, is if the "Governor of the State in which the gaming activity is to be conducted concurs in the Secretary's determination." 25 U.S.C. § 2719(b)(1)(A).

Congress did not make the same exception applicable for off-reservation lands "held in trust" for a tribe. On its face, therefore, absent state consent, IGRA prohibits the Secretary from taking land adjacent to the Huron Cemetery without full compliance with the conditions of IGRA, including the concurrence of the Governor of Kansas.

There is no evidence in the record to support the conclusion that the Huron Cemetery is the "reservation" of the Oklahoma Tribe as required by 25 U.S.C. § 2719(a)(1). There is no evidence in the record that the Oklahoma Tribe resided on the Huron Cemetery as of October 17, 1988, the effective date of IGRA. There is no evidence in the record that the Huron Cemetery was ever declared a "reservation" by congressional enactment. To the contrary, the record shows that the Oklahoma Tribe's members reside more than 200 miles from the Huron Cemetery on land set apart for their residence by Congress as of 1867. The only congressional

enactments dealing with the Cemetery refer to it as a cemetery or "public burying-ground," and nothing more.[10]

The circuit court's decision is also correct because the Huron Cemetery is not subject to the jurisdiction of the Oklahoma Tribe within the meaning of IGRA. The Indian Gaming Regulatory Act allowance for gaming is limited to "[a]ny Indian tribe having jurisdiction over Indian lands," or to "Indian lands with such tribe's jurisdiction." 25 U.S.C. §§ 2710(d)(3)(A), 2710(b)(1). Even if the Huron Cemetery were deemed a "reservation" under the Act, the Oklahoma Tribe does not have "jurisdiction" over the Cemetery. *See also* 25 U.S.C. § 2703(4) (one element of the definition of "Indian lands" is that the tribe "exercises governmental power" over the lands); 25 C.F.R. 151.2(f) (for purposes of trust acquisition, "Indian reservation" is defined as "that area

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10. Congress has restated its intent that the Cemetery be used only for cemetery purposes on numerous occasions.

> (1) the term "Huron Cemetery" means the lands that form the cemetery that is popularly known as the Huron Cemetery, located in Kansas City, Kansas, as described in subsection (b)(3); and
>
> . . .
>
> (b)(1) The Secretary shall take such action as may be necessary to ensure that the lands comprising the Huron Cemetery (as described in paragraph (3)) are used only in accordance with this section,
>
> (2) The lands of the Huron Cemetery shall be used only –
>
> (A) for religious and cultural uses that are compatible with the use of the lands as a cemetery; and
>
> (B) as a burial ground. . . .

Pub. L. No. 105-83, 111 Stat. 1543, § 1567, enacted Jan. 7, 1997. Subsequent appropriation acts have sustained this view. *See also* Pub. L. No. 105-277, 112 Stat. 2681, enacted Oct. 21, 1998; Pub. L. No. 106-113, 113 Stat. 1501, enacted Nov. 29, 1999; Pub. L. No. 106-291, 114 Stat. 945, enacted Oct. 11, 2000.

of land over which the tribe is recognized by the United States as having governmental jurisdiction").

The Oklahoma Tribe was unable to demonstrate the "presence of concrete manifestations of [governmental] authority" over the cemetery. *State of Rhode Island v. Narragansett Indian Tribe*, 19 F.3d 685, 703 (1st Cir. 1994) (Indian tribe must exercise governmental power over Indian land in order to trigger IGRA).

Indian tribes are sovereign governments with jurisdiction over both their territory and their members. *United States v. Wheeler*, 435 U.S. 313, 323 (1978). The geographic scope of tribal sovereignty is limited to "Indian country." *See Alaska v. Native Village of Venetie*, 522 U.S. 520 (1998).

In no sense of the term can it be said that the Huron Cemetery is today the sovereign territory of the Oklahoma Tribe, or that the Cemetery qualifies as "Indian country" subject to tribal jurisdiction. Nor could the Huron Cemetery qualify as a "dependent Indian community" under the Indian country statute. *See* 18 U.S.C. § 1151. This Court has ruled that two requirements must be met to qualify for this classification: 1) "they must have been set aside by the Federal Government for the use of the Indians as Indian land;" and 2) they must be under "federal superintendence" and active control of the Federal Government. *Alaska v. Native Village of Venetie Tribal Government*, 522 U.S. 520 (1998). In light of the undeniable fact that the Huron Cemetery was set apart as a *public burial ground*, the first requirement is not met. The second requirement likewise is not satisfied because the record reflects an unbroken history of municipal or private superintendence of the Cemetery, rather than Federal management and control.

Nor could the Oklahoma Tribe establish tribal jurisdiction by showing the exercise of governmental power over the land. Congress did not define what it meant by the exercise of governmental power in IGRA. In *Cheyenne River*

Sioux Tribe v. South Dakota, 830 F. Supp. 523, 528 (D.S.D. 1993), *aff'd*, 3 F.3d 273 (8th Cir. 1993), the district court identified five factors that may be useful in determining whether a tribe exercises governmental power for IGRA purposes: 1) whether the land is developed; 2) whether tribal members reside on the land; 3) whether any governmental services are provided and by whom; 4) whether any law enforcement on the lands in question is provided by the tribe or the state; and 5) other indicia as to who exercises governmental power over the land.

The Oklahoma Tribe did not, and cannot, satisfy any of these factors. The Huron Cemetery has not been developed beyond the original purpose for which it was established, as a public burial ground. No tribal members reside there now, and no tribal members have ever lived there. Neither the Oklahoma Tribe nor the federal government has ever provided any governmental services to the land, and neither do so today. The agency record is devoid of any evidence that the Oklahoma Tribe ever conducted any governmental affairs on the land. The Tribe provides no police or other law enforcement services to the Cemetery, and has never done so at any time in the past. The City of Kansas City has exercised jurisdiction over the land since at least 1918 and continues to do so today.

Moreover, a fundamental aspect of tribal sovereignty is the authority to exclude or expel non-members from an Indian reservation. *Duro v. Reina*, 495 U.S. 676 (1990). It is not disputed that the Oklahoma Tribe has no authority to exclude or expel any person from a *public* burying-ground.

These circumstances compel the conclusion that the Oklahoma Tribe does not exercise jurisdiction over the Cemetery as contemplated by IGRA.

4. The Circuit Court's Determination that the Huron Cemetery Is Not an Indian Reservation for Gaming Purposes Is Correct Because the Term "Reservation" Does Not Encompass A Free-Standing Public Burying-Ground that Has Not Been Used for Any Other Purpose Since at Least 1855.

In its decision, the circuit court held that the critical issue raised by the case was whether the Secretary acted arbitrarily or capriciously in concluding that the Huron Cemetery constituted a reservation for the purposes of IGRA. *Sac and Fox Nation of Missouri, et al. v. Norton, et al.*, 240 F.3d 1250, 1264 (10th Cir. 2001).

After reviewing the facts and law, the circuit court concluded that the Secretary's determination that the Huron Cemetery was a reservation for the purposes of IGRA was incorrect and not supported by substantial evidence in the record. *Id.* at 1267.

The question of the status of the Huron Cemetery certainly is critical. If the Cemetery is deemed a reservation of the Oklahoma Tribe, then the Tribe may be able to acquire land adjacent to it for the purposes of gaming without many of the safeguards of IGRA.[11]

Several reasons support the circuit court's conclusion that the Huron Cemetery does not constitute a "reservation" of the Oklahoma Tribe. First and foremost, the plain language of the 1855 Treaty reserving the parcel as a "*public* burying-ground" does not allow for such an interpretation, and settled Indian law doctrine precludes any different interpretation.

11. As we noted previously, the Oklahoma Tribe cannot simply buy land in Kansas City and build a casino because IGRA prohibits gaming on any land acquired after October 17, 1988, *unless* that land is located within or adjacent to a reservation that existed as of that date. *See* 25 U.S.C. § 2719(a)(1). Thus, the Oklahoma Tribe attempts to declare the Huron Cemetery – an old public "burial ground" in downtown Kansas City – to be part of the Oklahoma Tribe's "reservation".

The Treaty provided that the "Wyandott Nation hereby cede and relinquish to the United States all their right, title and interest. . . ." to the Cemetery and other land so that the lands may be ". . . subdivided, assigned and reconveyed . . ." to individuals and members of the tribes except that ". . . the portion now enclosed and use a public burying-ground, shall be permanently reserved and appropriated for that purpose. . . ." Treaty of 1855, art. 2, *reprinted in* 2 Kappler at 678.[12]

As the language and history of the Treaty of 1855 demonstrate, the United States did not intend, and at no time stated, that the Huron Cemetery was being reserved for any purpose other than that of a *public* burial ground. Neither in the Treaty of 1855 nor in any subsequent congressional enactment did Congress say that it had acquired or is maintaining the Huron Cemetery in trust for the Oklahoma Tribe as a tribal reservation. The land in question was never declared "reservation" land by any congressional enactment and nothing in the record below demonstrated otherwise.

Rather, the Treaty of 1855 specified that the parcel was to be solely and "permanently" used as a "public burying-ground." A permanent and *public* burying-ground never used by the Tribe for any other purpose simply cannot constitute a "reservation" under federal law. As noted earlier, the Cemetery, located in downtown Kansas City, Kansas, contains a number of Indian and non-Indian burials, and is located more than 200 miles from the Oklahoma Tribe's reservation in Oklahoma.

Moreover, the Cemetery was never a "residence" of the Oklahoma Tribe. The *residence* of Indians on the land is the *sine qua non* of an Indian "reservation" for IGRA purposes. The modern meaning of "Indian reservation" emerged in the 1850s, and referred to:

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12. The full text of article 2 is include in this brief at Section 2 "Relevant History of the Wyandotte Indians and the Huron Cemetery."

> land set aside under federal protection for the *residence* of tribal Indians, regardless of origin. By 1855 this meaning was firmly established in law and was intended in the Indian Major Crimes Act.

1982 Handbook at 34-35 (emphasis added).

As the Interior Board of Indian Appeals analyzed this question in a 1995 decision, the term "reservation" appears in several other Indian statutes, notably the Indian Reorganization Act ("IRA"), 25 U.S.C. § 467, which authorized the Secretary to establish new "reservations" and to add lands to existing "reservations," which "shall be designated for the exclusive use of Indians entitled by enrollment or by tribal membership to *residence* at such reservations." *Wyandotte Tribe of Oklahoma v. Muskogee Area Director, Bureau of Indian Affairs*, IBIA 95-79-A, 28 IBIA 247 (Oct. 25, 1995) [23 Indian Law Rep. 7081] (emphasis added).

A parcel that serves a particular purpose, such as a public cemetery, that is not otherwise located within a reservation on which tribal members live, does not in itself constitute a reservation.[13] There is no evidence in the record that any Oklahoma Wyandotte ever lived on the Huron Cemetery and certainly they did not do so after 1855. The Secretary's

13. The other uses of the term "reservation" for civil and criminal jurisdictional purposes are not pertinent here. The existence of "Indian country" as presently defined in 18 U.S.C. § 1151(a) is the basis for determining federal and tribal jurisdiction for purposes of criminal and civil jurisdiction. *United States v. John*, 437 U.S. 634 (1978); *see Decoteau v. District County Court*, 420 U.S. 425, 446-447, n.2 (1975) (noting that while section 1151 is concerned facially only with criminal jurisdiction, the Court recognizes that it generally applies as well to civil jurisdiction). Section 1151(a), as defined by the federal case law, is not the basis for determining whether a parcel of land is a "reservation" for purposes of IGRA. 25 U.S.C. § 2719(a)(1).

determination was contrary to law and without support in the agency record. The circuit court decision under the facts of this case was correct.

5. The Circuit Court's Determination that the Huron Cemetery Is Not an "Indian Reservation" Is Consistent with Relevant and Readily Available Historical Materials.

Mr. Robert Anderson, the Associate Solicitor who authored the two unsupported opinions on which the Secretary's Decision was based, candidly admitted in his deposition that all the grounds for his opinions were cited in the opinions themselves. Anderson Dep., at 44:9-12; 46:3-11 (Vol. III, App. Tab. 93, 570-71). Anderson admitted he did not review documents at the National Archives regarding the Huron Cemetery. Anderson Dep. 42:14-43:1 (Vol. III, App. Tab. 93, at 570).[14]

The Interior Department's wholesale failure to look at the readily-available history of the Cemetery would be negligent in the best of circumstances. Here, given the key nature of this determination to the trust acquisition, the failure constituted arbitrary and capricious action and an abuse of discretion which mandated reversal of the Secretary's Decision.

Dozens of documents in the National Archives collection attest to the character of the Cemetery as a public burying-ground, and nothing more. Since the Treaty of 1855, the Cemetery has been reserved for use as a public burying-ground, subject to the right of the members of the former Wyandottes (Kansas and Oklahoma), to be buried there. This dedicated status does not a reservation make.

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14. Although this case below was an appeal on the administrative record, the district court properly allowed limited discovery including depositions of key officials to augment the record and determine its completeness.

Indeed, over the years, Interior officials reiterated that the Cemetery was only a burial ground and that the only rights of the Tribe were burial rights (and rights to proceeds if and when Congress authorized and completed sale of the Cemetery, which never happened). Over the years, the federal government often ignored the Oklahoma Tribe's desires with regard to the Cemetery. There is no indication that anyone, from the United States Attorney General to the local Indian Commissioner, considered the Cemetery to be an Indian reservation. The Oklahoma Tribe did not even take care of the Cemetery. Pursuant to an agreement entered into in 1918, the City of Kansas City maintained and policed the parcel. Indeed, the federal District Court for the District of Kansas determined that the Oklahoma Tribe had abandoned any interest in the parcel. *Kansas City, Kansas, et al. v. United States et al*, 192 F. Supp. 179, 180 (D. Kan. 1960).

The public burying-ground is a public burying-ground, not an Indian reservation. The determination by the Secretary that the Cemetery was an Indian reservation had no basis in law or fact, and was properly set aside by the circuit court.

6. The Determination that the Huron Cemetery is the "Reservation" of the Oklahoma Tribe is Contrary to Public Policy as Expressed in IGRA.

There are historical and policy reasons why Congress would choose to allow an exception for gaming on lands contiguous to a tribe's existing "reservation" lands but not on lands which were simply held in trust or reserved for a particular use of an Indian tribe. Chief among these reasons is that IGRA came about in response to a specific United States Supreme Court decision, *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987).

In *Cabazon*, this Court held that the Cabazon Band of Mission Indians in California could conduct certain gaming on its reservation, limiting the State of California's attempts to regulate such reservation activity. IGRA represented

Congress's efforts to impose a federal regulatory scheme in the wake of *Cabazon* and the increasing number of tribal gaming enterprises. *See* S. Rep. No. 446, 100th Cong., 2nd Sess. 1-2, *reprinted in* 1988 U.S. Code Cong. & Admin. News 3071, 3071-73 (discussing the background leading to the development of the bill later enacted as IGRA, Pub. L. No. 497, 100th Cong., 2d Sess., 102 Stat. 2467 (1988) (codified at 25 U.S.C. §§ 2701-21 (1988)).

In enacting IGRA, Congress recognized that after *Cabazon*, tribes could conduct gaming on existing reservation land where gaming is "permitted" in the state of residence. *See* 25 U.S.C.§ 2701(5). Congress also wanted to promote tribal economies as well as to creating mechanisms for regulation of gaming. *See* 25 U.S.C. §§ 2701-02 (findings and declaration of policy). However, in 25 U.S.C. § 2719(a), Congress drew the line on further expansion of lands for such gaming, proscribing gaming on lands acquired by the Secretary under his trust responsibilities after the effective date of IGRA, October 17, 1988.

Similarly, Section 2719(b)(1)(A) reflects Congress's concern about the impact that a tribal gaming facility off-reservation would have on state government and non-Indian neighbors. Congress concluded that state governors and non-Indian citizens should be given a voice in the IGRA process and that the Secretary must consult and consider their well-being. Indeed, the concurrence of the governor must be achieved before gaming is allowed off-reservation on newly acquired lands. 25 U.S.C. § 2719(b)(1)(A).

There are numerous reasons why local authorities must concur. Gaming facilities may create law enforcement problems. When a facility is located on a reservation, one can presume tribal government has weighed these issues carefully and made an informed decision and has also made provisions through tribal law enforcement officers to assist

with these potential issues. When such a facility is located off-reservation, the tribe's ability to control the potential problems is lessened. Further, the interests of state and local entities are correspondingly greater. Congress intended that its non-Indian neighbors be consulted and governors concur. Section 2719(b)(1)(A) fulfills that purpose.

In sum, the circuit court correctly concluded that Congress did not intend in enacting 25 U.S.C. § 2719(a)(1) to include the Huron Cemetery, land reserved for a particular specified use as a public burial ground.

7. The Circuit Court's Decision is Consistent with Judicial Precedent.

Petitioner claims that the case of *Conley v. Ballinger*, 216 U.S. 84 (1910), "acknowledged that the Huron Cemetery was reservation land." Petitioner's Brief at 11. That case does no such thing. In *Conley*, this Court repeatedly noted that the Cemetery land was for use as a public burying-ground. The Court never implied that the Huron Cemetery was a "reservation." The case was brought by an individual, one Lyda Conley. Ms. Conley attempted to sue Secretary of the Interior Ballinger to enjoin him from selling or distributing land in the Cemetery. At the time, the government was evidently threatening to remove the remains of persons buried to another designated place and sell the burying-ground. *Conley* at 89. Ms. Conley's parents and sister were buried in the Cemetery. *Conley* at 88. In her complaint, Conley alleged that she had "seisin, and a legal estate and vested rights in and to . . ." portions of the Cemetery. *Conley* at 89. The case was dismissed for lack of standing and jurisdiction. That dismissal was affirmed by this Court on appeal. There is nothing in *Conley* which supports the view that the Cemetery was anything but a cemetery. The issue in *Conley* was simply whether an individual could sustain a suit against the United States. This Court held that there were no *individual* rights with reference to the Cemetery to be

upheld. It does not represent a ruling on the *status* of the *land* for the purposes of IGRA.

Petitioner also cites two other cases as support for the idea that somehow the Huron Cemetery, reserved as a public burying-ground, is in fact the Oklahoma Tribe's "reservation."

The first, *Seymour v. Superintendent*, 368 U.S. 351 (1962), Petitioner's Brief at 18, is inapposite. *Seymour* is a criminal case. There, a member of the Colville Tribe in Washington State, one Paul Seymour, was charged with burglary within the Colville Indian Reservation. He was convicted in state superior court. He brought a petition for a writ of habeas corpus urging that his state conviction was improper since there was no state jurisdiction over him or the crime, it having been committed in Indian country as defined in 18 U.S.C. § 1151. *Seymour* at 352. The trial court denied the writ solely on the grounds that the burglary had occurred within what was once an Indian reservation but had "since been dissolved. . . ." *Id.* at 353.

The case involved whether a 1906 act, providing for the sale of mineral lands and for settlement and entry under homestead laws on the reservation, actually ended the reservation's existence. *Id.* at 354-55. This Court held that it did not end the reservation status under the particular circumstances of that case. Noting that an earlier 1892 act had expressly "vacated and restored to the public domain . . ." the north half of the reservation, this Court noted that the 1906 act contained no such express language. *Id.* It is clear that at the time of the criminal acts in *Seymour* and at all times previous to that, the land in question had been an Indian reservation set aside as a residence for the Indians in 1872. *Id.* at 354. This Court also noted that Congress had subsequently specifically recognized the continuance of the reservation as a reservation for the Colville Tribe. *Id.* at 356.

The second case Petitioner cites is *United States v. Celestine*, 215 U.S. 278 (1909). Petitioner's Brief at 18. *Celestine* is also inapposite. In that case, a member of the Tulalip Tribes residing on the Tulalip Indian Reservation in Washington State was accused of murder of another tribal member. Both tribal members had been allotted land on the reservation under the Tribes' treaty of January 22, 1855 (12 Stat. 927). The offense allegedly took place upon the allotment of the victim. Both the perpetrator and victim had been issued "patents" for their land. The alleged perpetrator of the crime, Bob Celestine, argued that federal courts had no jurisdiction over him for murder under the federal Major Crimes Act, 18 U.S.C. § 1153, because the land was allotted to him individually. *Celestine*, at 280. This Court held that the offense was clearly committed within the "limits of the Tulalip Indian Reservation," and that even though the individuals involved had received allotments from the government as to their specific land, ". . . both tracts remained within the reservation until Congress excluded them therefrom." *Celestine*, at 284. There is no application to this case.

As the district court noted in *Kansas City, Kansas*, the Wyandotte Indians who moved to Oklahoma after the Treaty of 1855 "do not use it [the Huron Cemetery] and since their removal to Oklahoma have not used it. They have no interest in maintaining it as a cemetery." *Kansas City, Kansas, et al. v. United States, et al.*, 192 F. Supp. 179, 181 (D. Kan. 1960).

And, as noted earlier, the Interior Board of Indian Appeals has specifically found that the Oklahoma Tribe has no Kansas reservation. *Wyandotte Tribe of Oklahoma v. Muskogee Area Director, Bureau of Indian Affairs*, 28 IBIA 248 (1995). The Board held that the Oklahoma Tribe does not have an existing reservation in Kansas, noting "Only four tribes have been recognized as having reservations in Kansas,

those tribes being the Iowa, Kickapoo, Potawatomi, and Sac and Fox." *Id.* at 262 n.15.[15]

In *Oyler v. Allenbrand*, 23 F.3d 292, 295-96, 299 (10th Cir. 1994), the circuit court also confirmed that the only four Indian reservations existing in Kansas are those of the four Kansas Tribes herein. There was no recognition of any Oklahoma Wyandotte reservation in Kansas. Thus, the circuit court's decision in this case is entirely consistent with existing precedent.

CONCLUSION

This case involves a very particularized situation involving an historic public burying-ground in downtown Kansas City, Kansas. In an attempt to gain a commercial advantage for gaming purposes, the Oklahoma Tribe sought to have the cemetery determined to be a "reservation" for the Tribe so that it could acquire land next to the cemetery for gaming purposes without meeting the requirements of IGRA. Those requirements include concurrence of the Governor of Kansas as to gaming, and a finding that the gaming will not be detrimental to the public interest. 25 U.S.C. § 2719(b). Under the facts of this case, the Tenth Circuit Court of Appeals correctly concluded that the public burying-ground was not a reservation for the Oklahoma Tribe. The circuit court's finding is well supported by the historic record, the administrative record and applicable case law of this Court and other judicial bodies which have considered the question. This case does not involve questions of national significance nor does the decision below depart from the "accepted and usual course

15. There is no indication that the Oklahoma Tribe appealed the Board's decision. Therefore, under the doctrine of res judicata/ collateral estoppel, the Tribe is bound by the Board's decision that the Huron Cemetery is not its "reservation," and should not be allowed to relitigate that issue here. *Anglemyer v. Hamilton Co. Hosp.*, 941 F. Supp. 976, 978-79 and n.3 (D. Kan. 1996) (discussing the required elements of and policies behind the doctrine).

of judicial proceeding . . . as to call for the exercise of this Court's supervisory power." Sup. Ct. R. 10. The petition should be denied.

Dated: November 14, 2001

Respectfully submitted,

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